No. 3685

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLAF HAUGE,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Attorneys of Record:
For Plaintiff in Error,
ERWIN J. ROWE,
Washington Bldg., Portland, Ore.
Defendant in Error,
LESTER W. HUMPHREYS,
U. S. Attorney.

OPENING BRIEF OF PLAINTIFF IN ERROR

This is a writ of error from the judgment and the proceeding prior thereto, in the United States District Court, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

INDEX

	Page
Argument	13
Attorneys of Record	1
Brief of Argument	10
Conclusion	19
Points and Authorities	10
Specification of Error	3
Statement of Case	2

No. 3685

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OLAF HAUGE,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Attorneys of Record:
For Plaintiff in Error,
ERWIN J. ROWE,
Washington Bldg., Portland, Ore.
Defendant in Error,
LESTER W. HUMPHREYS,
U. S. Attorney.

OPENING BRIEF OF PLAINTIFF IN ERROR

This is a writ of error from the judgment and the proceeding prior thereto, in the United States District Court, for the District of Oregon, to the United States Circuit Court of Appeals, for the Ninth Circuit.

STATEMENT OF CASE

On or about the 9th day of January, A. D. 1918, in accordance with the Selective Draft Laws of the United States of America made and provided, there was made out for or by the defendant, Olaf Hauge, a Questionaire, and in which Questionaire there were made several claims for exemption from the Military service of the United States of America, among which claims were the following::

First—Because he was a resident alien, not a citizen of the United States.

Second—A man whose wife or children are mainly dependent upon him for support.

Third—Person totally and permanently physically unfit for service.

Thereafter and prior to the seventeenth day of June, 1920, Olaf Hauge filed a petition for naturalization to become a citizen of the United States of America, which said petition came on regularly for a hearing in open Court on the Seventeenth day of June, 1920, at which hearing said Olaf Hauge was called as a witness, and was thereupon duly sworn.

He was thereupon questioned by the Naturalization Commissioner of the Oregon District as to whether or not he had claimed exemption from the Military service of the United States of America at the time of making out his questionnaire, on the grounds of being an alien. To which question the said Olaf Hauge replied that he had not claimed exemption.

Thereafter the Naturalization Commissioner for Oregon, learned from the Adjutant General of the War Department, that said Olaf Hauge had claimed exemption from the military service of the United States, and he thereupon had the United States Attorney for the District of Oregon, place the matter before the United States Grand Jury, which duly returned an indictment against Olaf Hauge for violation of Section number Eighty of the Federal Penal Code. To which indictment Olaf Hauge pleaded not guilty, and was thereafter on or about the 8th day of February, 1921, tried in the United States District Court, for the District of Oregon, before the Honorable Judge Bean, at which trial the jury disagreed and was thereupon dismissed.

Upon the re-trial of the cause before the Honorable Charles E. Wolverton, the Court made certain rulings to which the defendant duly objected and excepted.

Wherefore, this writ of error is had, it being assigned as error that the trial court erred in the following:

I.

Plaintiff called as a witness V. W. Tomlinson, who testified that he is a naturalization examiner, duly appointed, qualified and acting for the United States of America; that five days before the hearing for admission of the defendant as a citizen, he received from the Adjutant General of the Army information that the defendant had in his ques-

tionnaire claimed exemption from the military service, on the grounds of being an alien; that he thereupon filed in the District Court of the United States for the District of Oregon, a petition for a rehearing of the defendant's petition for naturalization, and that, in August, 1920, such rehearing was had in open court in the District Court of the United States for the District of Oregon, and that at such rehearing, the defendant took the witness stand in his own behalf and was thereupon sworn to tell the truth, and that the defendant at such rehearing, after having been sworn as a witness, testified that he had at the prior hearing on June 17, 1920, testified that he had not claimed exemption from the military service of the United States at the time of making out his questionnaire on the grounds of being an alien.

Whereupon counsel for the defendant objected to the testimony as to the statements made by the defendant under oath at the rehearing, on the grounds that same were incompetent, irrelevant and immaterial, which objection was there and then overruled, and the said witness was allowed to testify as above stated, to which ruling of the Court, the defendant then and there excepted, which exception was then and there allowed.

II.

The said witness, V. W. Tomlinson, naturalization examiner of the United States, being on the witness stand, testified that he is the Naturalization Examiner in charge at Portland, Oregon; that the

defendant filed a petition for naturalization in the District Court of the United States for the District of Oregon; that thereafter and prior to the said 17th day of June, 1920, said witness, as Naturalization Examiner, sent to the defendant by mail a typewritten or printed blank form of questions to be answered by the defendant as an applicant for naturalization. That the said witness has the custody of the records of the Bureau of Naturalization, at Portland, Oregon. That prior to the said 17th day of June, 1920, the defendant wrote answers in the aforesaid blank form, sent in by the Naturalization Examiner and returned the same by mail, to the said Naturalization Examiner; since which time the said Naturalization Examiner has had the said blank form, with the answers of the defendant written thereon, in his possession, and then had it in his possession.

Whereupon, the witness was asked to produce said blank form with the written answers of the defendant, and the plaintiff then and there offered said blank form with the written answers of the defendant in evidence.

Whereupon, defendant objected on the grounds that the said blank form with the written answers, was incompetent, irrelevant and immaterial.

The Court then and there overruled said objection and said blank form with the written answers was received in evidence and was marked Plaintiff's Exhibit 1, to which ruling of the Court the defendant then and there excepted, which

exception was then and there allowed.

III.

Plaintiff then offered in evidence a certified photostat copy of the defendant's Questionaire, which was marked "Plaintiff's Exhibit No. 2," which disclosed that the defendant had made in said Questionaire claims for exemption from the military service of the United States, on the ground of being a resident alien, not an enemy, who claims exemption, and on the grounds that he was a person totally and permanently physically or mentally unfit for military service; and on the grounds that he was a man whose wife and children are mainly dependent on his labor for support; and further.

That the following questions and answers were contained in said Questionaire in series VII thereof, as follows:

Q. Are you a citizen of the United States?

A. No.

Q. Do you claim exemption from military service because you are not a citizen?

A. Yes.

Q. Are you willing to return to your native country and enter its military service?

A. Yes.

Thereupon plaintiff rested its case.

Whereupon counsel for the defendant moved the court for a directed verdict, on the grounds that the plaintiff had failed to show that the question asked defendant at the hearing, to-wit, whether or not the defendant Olaf Hauge, had claimed

exemption from military service on the grounds of being an alien, was a competent, relevant or material question.

Thereupon the court did then and there refuse defendant's said motion, to which ruling the defendant did then and there propose exception to the said ruling of the court, which exception was then and there allowed.

IV.

The defendant then and there took the witness stand in his own behalf, and testified that his wife had filled out his Questionaire, except as to when defendant came to this country, on what ship, and to what port of entry, that he did not discuss with his said wife claims for exemption made in said questionaire. Defendant further testified that he personally took the Questionaire before the Notary Public, who administered to him the oath in the registrant's affidavit.

Whereupon defendant to maintain and prove his case called as a witness, Mrs. Inga Hauge, wife of the defendant, who was then and there present, ready, willing and able to testify, and who would have testified had she been allowed to, as follows, to-wit:

That she was, at the time a Questionaire was made out for the defendant, to-wit, on the 9th day of January, 1918, she was the wife of the said defendant Olaf Hauge.

That all the questions in said Questionaire were answered by her, with the exception of as to when

the defendant came to this country, on what ship, and to what port of entry. And further that the defendant did not know what answers she made to the questions in the said questionaire, or what claims were made for his exemption from the military service, and that she had not informed him as to what claims were made therein.

Whereupon counsel for plaintiff did then and there object to allowing the said Inga Hauge to testify, on the grounds that she was the wife of the defendant and was therefore incompetent as a witness; and the said judge did then and there refuse to allow said witness to testify.

Whereupon counsel for the defendant did then and there propose his objection and exception to the said ruling of the court, which exception was then and there allowed.

V.

Thereafter the defendant called as witnesses the following, to-wit:

Emil Straub, who testified that he knew the defendant, and that he knew his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

Henry Swales, who testified that he knew the defendant, that he knows his general reputation for truth and veracity in the community in which he resides, and that such reputation is good.

A. B. Benson, who testified that he knows the defendant, and has known him for a year and a half, that he knows his general reputation for truth

and veracity in the community in which he resides, and that such reputation is good.

George Cole, who testified that he has known the defendant for over a year; that he knows his reputation for truth and veracity in the community in which he resides, and that such reputation is good.

J. S. Theberge, who testified that he had known the defendant for over a year and a half, that he knows defendant's reputation for truth and veracity in the community in which he resides, and that such reputation is good.

Thereupon attorney for the defendant in order to maintain and prove the issues of his case, attempted to call as witnesses the following named witnesses: M. C. Hill, Mr. Rates, Mr. Guy, and Mr. Shields, who were present in the court room and who, had they been allowed to, testified that they had lived in the same locality as the defendant; that they had known the defendant for periods of from one to two years each, and that they knew the defendant's general reputation for truth and veracity in the community in which he resides, and that such reputation of the defendant is good.

Thereupon the judge presiding at such hearing asked the defendant's counsel if the testimony of the said witnesses would be to the same effect as that of the six witnesses to defendant's reputation, as to his truth and veracity, who had just been called, to which defendant's counsel responded that they would.

Whereupon, the said judge did then and there refuse to allow the said persons to testify, on the grounds that the defendant had already called six prior witnesses on the same point and that further accumulative testimony as to the defendant's reputation for truth and veracity would not be permitted, to which ruling of the court the defendant then and there objected, on the grounds that the said court did not have the right to limit the number of witnesses as to the defendant's general reputation for truth and veracity, and the defendant then and there saved an exception, which exception was then and there allowed.

POINTS AND AUTHORITIES.

I.

The mere fact that testimony has been given by the defendant Hauge at a former hearing, is no grounds for admitting his declarations or admissions made thereat.

Savannah etc. Ry. Co. vs. Flannagan, 82 Ga. 579.

St. Joseph vs. Union Ry Co., 116 Mo. 636.

II.

The mere statement of V. W. Tomlinson that he mailed a blank form of questions and answers to defendant, and thereafter it was returned to him through the mail, was not sufficient proof for admitting the reply letter.

Smith vs. Shoemaker, 17 Wall. 630.

Butterworth and Lowe vs. Cathcart, 168 Ala. 262.

Kvale vs. Keane, 39 N. D. 560.

In order for the reply letter to have been admissable was necessary for the prosecution to have shown that the prior letter was deposited in the postoffice or some department thereof, properly addressed and stamped with sufficient postage.

Kvale vs. Keane, 39 N. D. 560.

Trezevant vs. Powell, 61 Tex. Civ. App. 449.

III.

It was necessary for the prosecution to have shown that the question as to whether defendant claimed exemption from military service was a relevant, material question.

Coyne vs. People, 124 Ill. 17.

State vs. Shupe, 16 Ia. 36.

Shevalier vs. State, 85 Neb. 366.

Dallagiovanna vs. State, 69 Wash. 85.

McDonough vs. State, 47 Texas Crim. 227.

Chamberlain vs. People, 23 N. Y. 85.

IV.

The wife of a defendant is a competent witness unless her testimony is offered to contradict a government witness.

Jin Fuey Moy vs. U. S., 254 U. S. ——.

V.

In all criminal actions, the accused is entitled to introduce evidence to the effect that, up to the time when the crime with which he is charged was committed, he bore in the community in which he lived a good character (reputation).

Cancemi vs. People, 16 N. Y. 501.

State vs. Northrup, 48 Iowa 583.
Edgington vs. U. S., 164 U. S. 361.
Thornton vs. State, 113 Ala. 43.
People vs. Garbutt, 17 Mich. 9.
Durham vs. State, 128 Tenn. 636.
State vs. Foster, 130 N. C. 666.

The prevailing character of the party's mind, as evinced by the previous habits of his life, is a material element in discovering the intent in the instance in question. Being of good character, it is improbable that he would have committed the crime with which he is charged.

Latimer vs. State, 55 Neb. 609.
State vs. Dickerson, 77 Ohio St. 34.

Evidence of good character must be weighed and considered by the jury in connection with the other testimony in the case, and is regarded as evidence of a substantive fact, like any other evidence tending to establish innocence.

Com. vs. Aston, 227 Pa. 106.
People vs. Friedland, 2 App. Div. 332; 37 N. Y. Supp. 974.

No matter how conclusive the other testimony may be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe in view of the improbability that a person of such character would be guilty of the offense charged. The witnesses excluded therefore should have been allowed to testify, for this was a question for the jury and not the court.

Remson vs. People, 43 N. Y. 9.

Vol. 10 A. L. R., Pages 9, 10, 11, 12, 13.
Vol. 8 R. C. L., Page 207.
Vol. 10 R. C. L., Page 948, Sections 120.

ARGUMENT

The mere fact that testimony has been given by the defendant at a former trial (the re-hearing), and in that proceedings he made certain admissions or declarations is no grounds for admitting those admissions or declarations in evidence at a later trial.

The witness must be produced under such circumstance just as much as a witness testifying De Novo. The prosecution should have asked the defendant as regards his declarations or admissions made at the re-hearing, and then had he testified contrary to truth and fact to have produced witnesses to impeach him. Having first laid a foundation of time, place and persons present.

II.

As stated by the court in the case of Kvale vs. Keane, 39 N. D. 560:: "We are of the opinion that it is a general rule that where a letter is offered in evidence, which letter is claimed to be an answer to a previous letter, before such letter which is the answer can be received in evidence, there must be proof that the previous letter was written and mailed."

In order to permit proof based upon the correspondence, he must bring himself strictly within this rule. "It is certain that the rule should not be extended." ' 'To do so would afford too great an

opportunity for fabrication and undue advantage." "We are of the opinion that where a person undertakes to show that he sent another a letter by mail, no presumption will arise that the letter so sent was received by the person to whom it was addressed, unless it is shown that it was deposited in the post-office, or some department thereof, as, for instance, in a mail box on a rural route, and that such letter was properly addressed and stamped with sufficient postage."

"It is conceivable that a person could write a letter to another and deposit it in the postoffice without stamping it and without placing postage thereon, and truthfully claim that he had addressed the letter to the party at his proper address and deposited it in the United States mail."

Although it is true that the department of Naturalization is authorized to use a franked envelope, it was not shown by the prosecution that such was used. The presumption that such was used, if such a presumption were indulged in, would be met with and overcome with the presumption of the defendant's innocence.

Again is it not conceivable, although such an envelope had been used, that through defective printing the franking had been omitted? We all realize that printers are not at all infallible.

III.

The weight of authority is that the false testimony of the witness, in order to make it perjury, must be material.

Section number eighty of the Federal Penal Code in part. * * * Or who in a naturalization proceedings shall procure or give false testimony, as to any material fact.

It was therefore incumbent upon the prosecution to have shown that the question as to whether or not the defendant had claimed exemption from the military service of the United States, in his questionnaire, was a relevant, material question. There is no presumption that it was; and there most assuredly is no statute of our laws which makes such a question a material one.

True, under the Federal Statutes at Large, Laws 1918, Session II, Chapter 143, Sub-Chapter XII, which is as follows:

> Section IV. * * * That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States, shall be relieved from liability to military service upon his making a declaration in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

Under this section and the regulations prescribed by the President, it was necessary for a neutral alien to file an affidavit declaring the withdrawal of his declaration of intentions.

Defendant Hauge did not file an affidavit in accordance with the above section or the regulations of the President nor in any way show an intent to withdraw his declaration of intention to become a citizen.

The wording of the statute is clear, to withdraw his declaration of intentions, by no sense of the imagination or moral perception can we see how such a statute would cover a case like the one under consideration, for this defendant did not cancel or withdraw his declaration of intention, but retained it and all rights thereunder.

Again it must be remembered that the defendant's questionnaire was made out on the 8th day of January, 1918, and that the above statute was not passed until May, 1918. We surely have better judgment than to think that an intelligent body of America's most eminent men like Congress would pass a law like the above with the intention of considering any neutral alien, who had claimed exemption by reason of his alienage, in a questionnaire made prior to the passage of the statute, had cancelled his declaration of intention and should be thereby barred forever from becoming a citizen. Such if that were their intention it would have been an ex post facto law. This court in considering a statute will construe it, and presume in favor of the statute being valid, rather than in favor of it's being invalid and unconstitutional.

This statute then would not have made the

testimony of the defendant relevant or material, and no other testimony having been offered to show that it was relevant or material, the court erred in refusing defendant's motion for a directed verdict.

IV.

It is true under the old days of the common law procedure of "all law and no justice," that a man's wife could not be a witness either for or against her husband. Under the code procedure however it is a well recognized rule that a wife is a competent witness in her husband's behálf. In the case of Jin Fuey Moy vs. U. S., 254 U. S. —, our Supreme Court said a wife could not be a witness for her husband to contradict a government witness. In this case, however, defendant's wife was not called nor would she have testified to contradict a government witness; but rather for the purpose of corroborating the testimony of her husband, who claimed, and on which his sole defense rested, that his questionnaire was made and filled out by his wife, and that he did not know what claims had been made therein for his exemption.

If this be true, and we have every reason to believe that it is true, what defense could he make without her testimony? NONE.

And what, if any, was the reason for a rule so radical? The mere fact that the wife of a defendant was an interested party in the outcome of the cause, and should therefore be excluded. But by this same logic was a man's children, father,

mother or other blood relatives excluded? They were not. Does this then not vitiate the very reason itself?

"Reason is the life of law."—Coke.

Is it reason to say that in a case where all the circumstances point to the guilt of the accused, suppose that he is charged with murder, and claims the alibi that he was at home in bed with his wife, to say that she, the only person in God's world to testify in his behalf, could not utter one word to save her innocent mate from a murderer's fate? If such it be, then there was no error in the ruling of the trial court in not allowing her, his only witness, to testify. For although her testimony might have saved him, alas, she is his wife, faithful and true, and therefore disqualified; but, alas, were she a consort, ah! the rule is different.

Are we to understand that our laws are as expressed in the Atlantic Monthly for December, 1920, at page 863, reprinted in Oregon Law Review, April, 1921, page 24:

> "On reading Mr. Bartell's 'The Newer Justice,' in your September number, I was strongly reminded of the reply of a professor in the ——law school. To my contention that a certain ruling of the courts, a well settled precedent, was not just, said the eminent jurist with a sigh, 'If you want JUSTICE, go to the DIVINITY school. We study law here.' "

This attitude was no doubt reflected into mod-

ern law, which goes by the "rules of the game." Let us trust, however, it will no longer continue.

V.

In all criminal actions the accused is entitled to introduce evidence to the effect that, up to the time when the crime was committed, he bore in the community in which he resided a good character (reputation). For the prevailing character of the party's mind as evinced by the previous habits of his life, is a material element in discovering that intent in the instance in question. Being of good character it is improbable that he would have committed the crime with which he is charged.

Evidence of good character must be weighed and considered by the jury in connection with the other testimony of the case, and is regarded as evidence of a substantive fact, like any other evidence in the case tending to establish innocence. For no matter how conclusive the other evidence may have been the evidence of good character may have been such as to have created a doubt in the minds of the jury of the guilt of the accused. The number of witnesses on character or the amount of weight to be given them was not a question for the court but rather for the jury.

Possibly the jury were not impressed with the first six witnesses of character, whereas the last six might have made a great impression on them.

CONCLUSION

This case presents a record for your review in which the defendant was not granted a fair and

impartial trial. Where evidence was admitted and other evidence excluded, that should not have been.

This review being done in the careful manner in which this court always disposes of its cases, must result in a reversal of the judgment.

Respectfully submitted,

ERWIN J. ROWE,

Attorney for Plaintiff in Error.